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No. A-265

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

David A. Young, Sr. Appellant

V.

Joshua Park, et al, Appellees

ON APPEAL FROM THE SUPREME COURT

OF RHODE ISLAND

JURISDICTIONAL STATEMENT

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December 2nd, 1980

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QUESTIONS PRESENTED

The most important question raised on this appeal is that of the unfair denial of the appellant's Constitutional Rights to Due Process of Law and Equal Protection of the Laws guaranteed by Amendment 14 of the United States Constitution.

In this case, this deals with several questions which appellant herein deems substantial. Many of the actions taken by the Rhode Island legal system concerning appellant's case were so unfair as to shock the conscience of justice. The main question

heretofore mentioned is the theme of this statement and the following questions are all relevent to it, many of them concerning fair play: 1. Whether the Rhode Island Supreme Court's decision to bar appellant's joining the later added defendants by the statute of limitations was fairly decided in light of appellant's raising the issue of the denial of his Constitutional Rights (Amendment 14) and also arguement being made that he was doing all in his power to seek redress for grievances. Appellant contends that the issue was unfairly decided and his rights under Amendment 14 U.S.C. were held invalid by the Supreme Court of Rhode Island (hereinafter the lower court). 2. Whether appellant recieved a fair trial in the Rhode Island Superior Court. 3. Whether appellant should have been awarded a new trial having raised the unfairness. 4. Whether appellant ever had effective councel throughout the litigation. 5. Whether appellant was discriminated against by various governmental

and legal authorities in the State of Rhode Island,. causing him to endure the grievous loss. incurred by the actions of the appellees 6. Whether the proceedings were just to the parties affected.. 7.. Whether the lower court denying various motions to clarify the facts in the case was in the interest of justice. 8. Whether the appellees are in fact guilty and the dismissal of appellant's action would constitute a miscarriage of justice.

The parties to the proceeding are:

Joshua Park,. M.D.,. C.O. Hoffacker Co., William J.H. Fischer,Jr., M.D., John C. Osenkowski,. M.D., Stanley T. Grzebian, M.D. and Elmwood Medical Laboratory.

OPINIONS BELOW

The opinion of case no. 74-237-A from the Supreme Court of Rhode Island, which is reprinted in the appendix hereto, p. A23, is reported at 116 R.I. 568(1976). The opinion of case no. 77-363-A is not yet reported and is reprinted in the appendix hereto, p. A1. The decree from the Workman's Compensation Commission is reprinted in the appendix on page A34.

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STATEMENT OF THE GROUNDS

This is an appeal from the decision of the Supreme Court of Rhode Island (lower court). The lower court's opinion was entered on July 21,1980 affirming the judgment of the Rhode Island Superior Court and thereby denying appellant any further course of action in the State of Rhode Island. Notice of Appeal was filed with the lower court on August 15,1980, amended and refiled on August 28,1980. The jurisdiction of the Supreme Court of the United States is believed to be invoked by Title 28 U.S.C. 1257(1). Cases believed to sustain the jurisdiction have to do with fair play as the record will show and this statement will argue that throughout appellant's litigation he was treated unfairly and thereby denied his civil rights by the Rhode Island legal system.

> "Due Process" is not necessarily judicial due process for due process is elusive, undefinable and varies to embody the differing rules of fair play...."
> (Garvey v. Freeman, C.A. Colo. 1968, 397 F.2d. 600)

Fairness is a requirement of "due process".
(Petition of Wright, D.C. Ark. 1968, 282 F.Supp. 999)

Fair Play is the essence of "Due Process"
(Galvan v. Press, Cal. 1954, 74 S.CT. 737,347, U.S. 522)

CONSTITUTIONAL PROVISIONS AND RULES

Fourteenth Amendment, United States Constitution:

#1. Citizenship-Privileges and Immunities-Due Process of Law-Equal Protection of the Laws.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its juisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case is essentially one of medical malpractice but also involves undue influance, conspiracy to conceal chemical poisoning and thwart litigation, concealment of a cause of action and legal malpractice.

The common denominator joining the legal and medical aspects of the case is appellant's charge that the doctors and lawyers conspired with C.O. Hoffacker Co.(hereinafter Hoffacker) to conceal the use of dangerous chemicals at the company(carbon-tetra-chloride) which resulted in the deaths of four men and the appellant's own initial illness.

The conspiracy started in Sept., 1962, when appellant quit his job at Hoffacker and informed the foreman that he thought he had toxic poisoning and was going to the Lahey Clinic in Boston, Mass. to check this out. (Appellant learned about carbon-tet. poisoning from an article in Readers Digest). Three employees for Hoffacker died in this year: J.R. Burnstingle,Jan.22,1962, E. Dunn, Jan.

23,1962 and W.J. LaCross, Feb. 3,1962. From the death certificates and the study of medical texts appellant has learned that these deaths could be medically consistent with chemical poisoning. This issue was not considered by the R.I. courts due to legal malpractice which will be discussed later in this statement.

The following week after appellant quit, Clair Hoffacker, owner of the company, came to appellant's home and convinced him to see Dr. Grzebian. Appellant did not at this time connect the heretofore mentioned deaths to his own condition and naturally thinking that his employer's concern was for his health, he agreed.(This is undue influance).

Grzebian examined appellant at his home and had a thorough blood examination performed at East Side Clinical Laboratory which indicated a red blood cell count of 7,580,000, which is abnormally high. The hematocrit level of this test was 58% which is only slightly high. The significance of this test is that in the &

diagnosis of polycythemia vera could only be considered if the red blood cell count(R.B.C.) and hematocrit showed a coinciding rise. The appellant contends that this blood picture showed carbon-tetra-chloride(hereinafter carbon-tet.) poisoning which would be medically consistent with secondary polycythemia. Appellant contends that Grzebian knew this and was covering it up to protect Hoffacker. At trial,Grzebian admitted that "paint fumes" could be medically consistent with secondary polycythemia. Appellant's councel asked if toxic paint fumes could be consistent, said "strike toxic" and subsequently ignored this issue throughout the trial. In fact, when appellant was testifying and pointed out what Grzebian had said in this regard, his councel warned him sternly about commenting on testimony. Appellant contends that his councel was not acting in his best interests from this point on although this was not realized until later in the trial. This issue was raised in appellant's motion for new trial.

Grzebian referred appellant to Dr. Fischer, a so-called hematologist(Hematology is the study of blood conditions). Fischer examined appellant and the blood study he performed showed a hematocrit of 56% which is not high enough to justify a diagnosis of polycythemia vera. On Fischer's records he states that appellant "probably had 2% polycythemia". This is absurd. Fischer ordered no further blood studies, never confirmed the diagnosis, but had twelve phlembotomies ordered over a two year period from Oct. 13, 1962 to Dec. 12, 1964.(The purpose of a phlembotomy is to reduce the total blood volume in the body thereby eliminating the symtoms of polycythemia vera). Appellant contends that his blood condition was caused by carbon-tet. poisoning and that at this point in time Hoffacker, Grzebian and Fischer knew this and were covering it up. Appellant was admitted to St. Joseph's Hosp. under care of Dr. Coleman for a tumor of the mouth.in 1963. This tumor and appellant losing a number of

teeth during this period are further evidence of chemical poisoning. Coleman's impressions during this period were "probably not true polycythemia" a matter of record.

Because Fischer would do nothing about appellant's complaint of carbon-tet. poisoning, when he went back to him on Dec. 17, 1964, appellant again decided to go to Boston to checked for it.(Herbert Rooste, another employee for Hoffacker died on Dec. 17, 1964). On Dec. 23,1964, appellant asked Mr. Anger and Mr. Salisbury(employees for Hoffacker) for a ride home from work because of feeling very sick. He informed them that he would get to Boston this time for sure. The next morning, Charles Fraser, personell manager for Hoffacker, came to appellant's home and after considerable talking convinced him to see Dr. Park, the shop doctor. He consented, but unknown to him at this time, this was another attempt to conceal chemical poisoning, more undue influance.

Park saw appellant on Dec. 24,1964 and ord-

ered a blood study performed at Elmwood Medical Laboratory(Elmwood). Park gave appellant a prescription for Myleran pills on that very day without having the results of a blood test. In his deposition, Park claimed that Fraser of Hoffackers' told him appellant had polycythemia. At trial he claimed that appellant told him this. Appellant told Park he thought it was carbon-tet. poisoning and Park said he would check for it. He did not, the records prove this. In fact, none of the bl blood tests performed by Park verified his diagnosis of polycythemia vera, yet he testified that he would not have prescribed the drug myleran if it was not vera. Myleran is a very dangerous drug as it supresses the activity of the bone marrow, which produces blood cells in the body. Appellant was told by the druggist who filled the prescription that it was a very dangerous drug and when appellant asked Park about this Park said that the pills were mild.

These issues of the time of the planned

therapy and informed consent are clarified by affidavits newly acquired after appeal had already been taken from the druggist and appellant's estranged wife but were ignored by the lower court. Park prescribed 515 myleran pills (90 would supress the bone marrow) from Jan. 7,1965 to June 24,1965. This chemotherapy resulted in appellant's condition of aplastic anemia(usually fatal). He was admitted to Roger Williams Hospital in July,1965 with that diagnosis. Appellant and his wife had to call Park several times to get him to put the appellant in the hospital for blood transfusions. When appellant, acting as his own attorney, asked Park "why wouldn't you put me in a hospital when I needed blood?" Park replied "because that's part of the treatment". This is absurd.

After admission to Roger Williams Hospital, Park called in a consultant, Dr. Osenkowski, to assist in treating the aplastic anemia. He prescribed prednizone pills, 24 a day to stimulate the bone marrow. Appellant contends

that the prednizone made him diabetic. Park and Osenkowski were trying to put insulin in him for his diabetic condition, but he refused to take it. Appellant's wife brought Dr. Sharp into Roger Williams Hosp. as a consultent and he stopped the insulin and reduced the prednizone dossage. Park then discharged appellant on Aug. 5,1965 in just as severe an anemic condition as he was admitted for. The records prove this. Dr. Sharp examined the records on Aug. 4,1965 and told appellant he was allright, he was not he needed blood. Dr. Kerzner, covering for Sharp in his absence, examined appellant's blood and told him he was allright on Aug.20,1965. Sharp tested appellant's blood on Aug. 24,1965 and told him he was allright, he wasn't, he was anemic. On Aug. 25,1965, appellant called Dr. Osenkowski for consultation in his office. He tested appellant's blood and immidiatly admitted him to Our Lady of Fatima Hosp. for hypo-plastic anemia.(the admission was one of emergency). Appellant contends that when Osenkowski ad-

mitted him to hospital he made him diabetic. Appellant was not diabetic on admission. The reason for this foul treatment is part of the conspiracy. Diabetes and carbon-tet. poisoning both show secondary polycythemia on the onset. Appellant becoming diabetic would cause doubt as to what caused his blood condition thereby protecting Hoffacker. The records will show that Osenkowski's treatment of appellant was brutal. His therapy consisted of prednizone and butisol chemotherapy and a diabetic diet and had appellant's blood sugar as high as 3.36 milligrams percent which is very high. On discharge from Fatima Hosp., Sept. 19,1965, appellant was weak, anemic, spilling sugar and taking 30 units of insulin per day. He lost 25% of his body weight in one week. He returned to Dr. Sharp the same day on discharge from Fatima. Sharp took no laboratory tests during this period. When appellant went to Sharp on Oct. 4,1965, for a severe nose bleed, Sharp admitted him to Miriam Hosp. for severe anemia. The nose

bleed was due to a low platelet count(platelets are the most sensitive element of the blood to myleran). During the heretofore mentioned hospitalizations it took 16 pints of blood transfusions to keep appellant from dying. Blood transfusions of fresh blood were given during the hospitalization at Miriam and after this appellant never needed another blood transfusion. In fact, appellant contends that from the first hospitalization to the last, all he needed was nutrition and blood. None of this should have been necessary if the myleran had not been negligently administered. Indeed the myleran should not have been administered at all if the diagnosis had been properly verified. This is all a matter of medical records that prove it.

Appellant contends that these facts are clear evidence that the heretofore named physicians maltreated him. He was discharged from Miriam Hosp. in Nov.,1965 with a poor prognosis and the fear that the neuritis incurred while being treated with either myler-

an or prednizone might leave him permanently disabled. (These were Dr. Sharp's impressions on discharge). This is in fact true, appellant is permanently disabled from the malpractice of these doctors.(Sharp's involvment has only recently been realized by the appellant.)

The evidence of this was withheld for the mostpart by appellant's attorneys. Richard Worrall, Esq. signed a fee arrangement with appellant to prosecute his claim. Worrall sued Dr. Park in R.I. Superior Court and Hoffacker in Workmans Compensation Commission(hereinafter W.C.C.) in April of 1967. He failed to file against the other defendants. In W.C.C., the Commissioner ordered Worrall off the case when it was realized that his firm represented the insurance carrier for Hoffacker(Liberty Mutual). The first petition, which Worrall filed in W.C.C., named two employees from Hoffacker who would have testified for appellant as to the use of carbon tet. at the company. After Worrall

was ordered off the case, Howard Lipsey,Esq. filed a new petition in which the witnesses were omitted. Lipsey then abandoned the case and sent it back to Worrall. This is obviously unfair practice. The firm of Worrall and Hodge then informed appellant they would not represent him. Appellant kept trying to get an attorney to represent him and finally got Thomas Angelone to revive the W.C.C. case. Angelone allowed an affidavit of perjury by a representative of Hoffacker to be submitted which resulted in the dismissal of the case. This was in 1970. The affidavit claimed that carbon-tet. was not used at Hoffacker while appellant worked there.

In 1972 the malpractice action was revived by Ernest Barone, appellant's trial attorney heretofore mentioned. He promised appellant he would sue the prior attorneys for stalling the action but did not. He also misrepresented appellant in his action. All of these attorneys were charged by appellant before the Diciplinary Councel and all of

the charges were dismissed as being without merit. This brings to light the fact that appellant never had effective councel during his entire litigation.

In appellant's brief appeal no. 74-237-A the question of the denial of his civil rights under Amendment 14 U.S.C. was raised. The relevant issues of the denial of a full, fair and impartial trial was raised in appeal no. 77-363-A, and the failure of the proceeding to do justice between the parties affected was raised in appellant's motion for a new trial.

This statement of the facts in the case are deemed by appellant to be important in this Honorable Court's consideration of this appeal and have therefore been included.

> The Supreme Court feels itself free to make an independant examination of the facts when necessary to decide whether a person has been deprived by a state court of a right secured by the Constitution.
> (Norris v. Alabama,294 U.S.587,590.)

In appellant's brief(74-237-A) it is argued that at no time was he dialatory or negligent in instituting a timely judicial action. That from Jan. 1,1966 until the present time he has made persistent, reasonable in light of the circumstances, continuous, legitimate and timely attempts to seek redress for his grievances.(This is demonstrated by plaintiff's exhibits 1-10 C.A. 67-1705). The fact of the matter is that appellant was powerless to bring a timely judicial action and never had effective councel to do it for him. This arguement brings to light a substantial federal question in light of these facts: Appellant can demonstrate that the R.I. Medical Society deliberatly mislead him by not distinguishing between polycythemia vera and secondary polycythemia and concealing Dr. Fischer's records. That Richard Worrall deliberatly failed to bring action against Fischer and Grzebian in the malpractice action because his firm represented the insurance carrier for Hoffacker in the years appellant worked there and was

treated by them. That Worrall failed to bring action against Osenkowski and Elmwood Medical Lab. contrary to his duty as an officer of the court. That Hoffacker, either independently or in concert with Lipsey and Angelone caused false statements to be made to the W.C.C. and even had an affidavit of perjury submitted that resulted in the dismissal of the compensation claim and abandonment of the civil action. As to the W.C.C claim being settled, appellant contends it was under duress and clearly not enough to compensate him for his losses. That the attorney general further deprived him of his civil rights by failing to take any action or even investigate the criminal charges made by him. That as a matter of due diligence appellant filed charges against his former attorneys all charges being dismissed as being "without merit". Appellant was subsequently denied access to the records of these proceedings so he could not therefore pursue it "pro-se". That both the Superior AND

Supreme Courts of Rhode Island did not consider all the questions raised during trial and on appeal and abandoned the search for the truth in favor of technicalities. Appellant contends that his civil rights have been held invalid by the Rhode Island legal system.

> "Officials discriminating against plaintiff in such a way as to deny him equal protection of the laws is a substantial Federal Question" (Neal v. Delaware, 103 U.S. 370)

The issue of due process of law and arguement that the rights had been violated was raised in appeal 74-237-A. Ernest Barone, then appellant's attorney, failed to appeal it further but as the case had not been finally decided, appellant deemed it proper to raise all issues in one appeal after the final judgement of the Rhode Island Supreme Court. The reason therefore is:

> "The Supreme Court of the United States lacks jurisdiction where there is no <u>final</u> judgement in the highest state court." (Southern Pacific Co. v. Gileo, (1956) 351 U.S. 493)

In the lower court's opinion it is stated that Grzebian pointed out that "the state of

the art" of medicine was such in 1962 that one could not differentiate between polycythemia vera and secondary polycythemia. The opinion goes on to say that Dr. Von Oettingen article "remains a mystery". This article, copyrighted in 1958, concerns itself with the effects of chemical poisoning including the effects of carbon-tet. poisoning, those effects being that on the onset exposure to carbon-tet. shows symptoms of polycythemia. How this could remain a mystery to the lower court is truly amazing, and is evidence that said court failed to reach all the issues. The exclusion was argued in appellant's brief the pages of the transcript where it's relevancy and materiality was argued were included and properly appended therein, a copy of the article itself was appended thereto, and the article's relevancy and materiality was subsequently argued in appellant's memorandum in opposition to appellee's motion to affirm. (hereinafter memorandum). This article also voids Grzebian's claim that in 1962 one could

not distinguish between the two types of polycythemia. It is interesting to note that all of the physcians with the exception of Dr. Baldini that were called to testify by appellant's attorney were involved in either treating or mistreating appellant. This attorney deferred Baldini's appearance.

As to the lower court's opinion regarding the informed consent issue, appellant argued in his memorandum that because it was a matter of his word against the doctor's, he obtained an affidavit from his estranged wife Barbara, who stated and swore to the fact that she was present in Park's office and witnessed Park telling appellant that the pills(myleran) were mild. This was pointed out and appended in appellant's memorandum as it was acquired after appeal had already been taken. This affidavit seems to have been ignored by the lower court.

The lower court goes on to claim that the appellant discharged his attorney and assured the trial justice he would be ready to pro-

ceed forthwith. This claim is vague and inaccurate. Appellant was abhorred by the actions of his councel and stood up in open court because of this. The trial justice asked if appellant wished to discharge his councel and he said he would do so. The trial justice then expressed that he would not grant a continuance. Appellant, not knowing how else to proceed, then assured the trial justice he would proceed forthwith. It was argued in appellant's memorandum that this action by the trial justice was a disallowance of his right to move for a continuance, but this issue is ignored in the lower court opinion. The importance of this issue is that, unknown to appellant at the time, his trial attorney had withheld Von Oettingen's article, an explanatory article on the dangers of myleran, and the defendant's deposition. Therefore, appellant could not have used this evidence due to section 9-19-30 of the R.I. general laws as stated in the opinion. At least a 30 day continuance was nec-

essitated by the actions of his former counsel. This was argued in the memorandum also.

The issue of Dr. Baldini's removal from the stand is more involved than the opinion would indicate. The trial justice, during appellant's re-direct examination, told appellant "you have two minutes. I assurred Dr. Baldini he would be out of my courtroom at 11 o'clock." After dismissing Baldini, the trial justice said to him "I think I lived up to my promise to you." This is clearly abuse of discretion as argued in appellant's memorandum.

It is appellant's firm contention that the transcript of this trial has been edited. For whatever reason, it has caused the denial of appellant's right to equal protection of the laws as it forced a settlement with Barone, letting him "off the hook" so to speak. Two motions were made to correct the record. One in accordance with the lower court's rules and one requesting it be retransmitted on the days in question under

authority of the Freedom of Information Act. These were both denied. A motion to enlarge the record, including the defendant's(Park) deposition and a newly acquired affidavit was also denied. It seems clearly that an interest in the truth was not held by the lower court. The deposition proves that Park lied either in court or in the deposition. This was pointed out in the motion. Also pointed out in the motion was that the affidavit would clarify an issue of importance. How then, was it fairly considered in light of reaching all questions raised on appeal? Appellant contends that his appeal was not fairly considered in the interest of justice.

> "Due Process is denied where the procedure tends to shock the sense of fair play."
> (Howard v. U.S., C.A. Cal.(1967) 372 F.2d. 294)

The lower court's heretofore mentioned decisions have caused the appellant to endure the suffering, disabling effects and mental duress caused by the appellees. Had the case been reconsidered, or handled properly in

the first place, the evidence that the doctors malpracticed would easily prove that aspect of the case with the aid of an impartial expert witness.(One was not present at the trial). The lawyers involved deliberatly stalled the action and the lower court refused to consider the injustice incurred, but rather dismissed the action on technicalities and points of law that favored the appellees. The lower court even denied appellant's motion to have a court reporter present at oral arguement. Therefore, said arguement is not a matter of record.

> "Procedural due process rights attach where state action condemns a person to suffer a grievous loss of any kind."
> (McNiell v. Butz, C.A. N.C., 1973, 480 F.2d. 314)

Appellant's last effort in Rhode Island was a detailed letter to the R.I. Board of Medical Review dated April 2,1980. Receipt was acknowledged but no further answer has yet been recieved.(File no. C80-25 A-G). A letter from appellant's current doctor, ex-

plaining the nature of appellant's disability is appended hereto. Dr. Ricci's letter is further evidence in appellant's favor.

As to whether the proceedings were just to the parties effected, the answer is obvious. Appellant herein was crippled, almost killed, and except for the heretofore mentioned inadequate settlement in W.C.C.(which was also dismissed, decree appended hereto) no other compensation for this loss has been obtained.

As to whether the appellees are in fact guilty, a full, fair and impartial trial, without the exclusion of evidence, impartial expert witnesses and authority of appellant to prosecute his claim, the evidence that they are guilty is overwhelming. What is absolutely certain about this case is that appellant herein has been severely and permanently injured and as yet has not had a full, fair and impartial trial in which to seek redress for his grievances.

> "...the judicial proceeding must be one that is appropriate to the case and <u>just</u> to the parties

affected."
(Burton v. Platter, C.C.A.
Ind. T. 1893,53 F.901,904)

The truth can only be brought forth and justice obtained for appellant by this Honorable Court's consideration and subsequent action as may be just. This is within this Honorable Court's jurisdiction under Title 28 U.S.C. 2106:

> The Supreme Court or any other court of appellate review may affirm, modify, vacate, set aside, or reverse any judgement, decree or order or require such further proceedings to be had as may be just under the circumstances.

THE QUESTION IS SUBSTANTIAL

Appellant herein deems the questions and points set forth in this statement to be substantial for the following reason: If this type of conspiracy is to be condoned, then the very basics on which this Great Nation was founded are in jeopardy. When a status group such as, in this case, industrialists, doctors and lawyers can deprive a common working man of fair treatment medically and legaly in favor of their own

finacial interests, then equal protection of the laws for all citizens becomes equal protection for those who can afford it. The suffering appellant incurred was for simply wanting to get well from whatever it was that ailed him. Instead, in order to protect an industrialists financial interests, he was crippled, indeed almost killed by mal-treatment. This surely shocks the conscience of justice.

WHEREFORE: Appellant herein respectfully submits that this Honorable Court should note probable jurisdiction of this appeal.

Respectfully submitted,

David A. Young, Sr., Pro-Se
22 Berwick Avenue
North Providence, R.I. 02911

December 22nd 1980

PROOF OF SERVICE

I, the undersigned, do hereby certify that copies of the attached Jurisdictional Statement were mailed to the concerned parties through their attorneys at their respective addresses listed hereon..

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Copies mailed December 2nd, 1980

David A. Young Sr.

David A. Young Sr. Pro-Se

STATE OF R.I., COUNTY OF Providence

Subscribed and sworn to, before me, this 2nd day of December 1980.

Peter L. Copley Notary Public

Notary Public

Jul. 21, 1980

David A. Young, Sr. : Supreme Court
:
v. : No. 77-363-Appeal
:
Joshua Park : O P I N I O N

KELLEHER, J. This is a Superior Court medical malpractice civil action in which the defendant physician is charged with negligence in the diagnosis and treatment of the plaintiff's ailments. The plaintiff also claims that the defendant never informed him of any of the risks involved in the treatment prescribed by the defendant. This appeal follows the trial justic's grant of the defendant's motion for a directed verdict on the misdiagnosis and treatment claims and the jury's rejection of the plaintiff's informed-consent claim. Hereinafter we shall refer to the plaintiff and the defendant by their last names.

On September 30, 1962, Dr. Stanley T. Grzebien made a house call at 22 Berwick Avenue in Centerdale and there examined a forty-five-year-old male who complained of dizzi-

ness and headaches. The examinee was Young. on the next day, October 1, 1962. Young appeared at Dr. Grzebien's office. Young, a tool maker by trade, attributed his malaise to the odor of paint which permeated his work area in a Cranston machine shop. Doctor Grzebien made a series of tests, which included an analysis of Young's hemoglobin. The results of the hemoglobin test caused Dr. Grzebien to make the following notation in the Remarks portion of the form he was filling out as he examined his patient: "Imp polycythemia? Primary? * * *".

In speaking to the jury in layman's terms, Dr. Grzebien defined polycythemia as an overproduction of red cells. Thanks to Dr. Grzebien and a number of physicians who followed himas witnesses at the trial, the jury soon became aware that polycythemia is a disease that causes an abnormal elevation in the number of red blood cells, thereby increasing the blood's viscosity and correspondingly multiplying the risk of blood clots.

There are two types of polycythemia: primary and secondary. The cause of primary polycythemia is unknown, whereas secondary polycythemia can be attributed to such factors as heart disease, emphysema, or prolonged residence at high altitudes. Doctor Grzebien also reported that the state of the art was such in 1962 that he was unable to determine whether Young's illness could be classified as primary or secondary polycythemia. Since laboratory tests of Young's blood confirmed Dr. Grzebien's initial impression, Young was referred by Dr. Grzebien a general practitioner, to Dr. William J. Fischer, a hematologist.

Doctor Fischer first saw Young in October 1962 and prescribed a course of therapy which called for periodic phlebotomies. A phlebotomy, Dr. Fischer explained, "is simply withdrawing blood," and he reminded the jurors that a Phlebotomy is performed any time an individual donates blood. The withdrawal lowers the number of blood cells.

The doctors office records indicate that Young at one point thought the phlebotomy therapy was affording him relief. Doctor Fischer was convinced that Young had polycythemia, but he could not specifically characterize it as being secondary to any other disease. Dodtor Fischer's file on Young was closed on February 1, 1965, when his office received a call from Young's wife with information that her husband was under the care of Park.

Before we consider Park's testimony, we not that five other doctors testified at trial. These five, plus Drs. Grzebien and Fischer, all appeared in response to subpoenas issued by Young.

Doctor George V. Coleman, a surgeon who specialized in tumor surgery, examined Young in april 1964 as the result of a referral by a dentist. Young at that time had a tumor on his upper right gum. Laboratory tests performed at St. Joseph's Hospital confirmed the presence of polycythemia. The surgeon

said he had no reason to be "uncomfortable or critical of Dr. Park's management of Mr. Young."

Doctor John C. Osenkowski, a board-certified internist who acted as a consultant to Park, saw Young during the summer of 1965 and subsequently treated him at Our Lady of Fatima Hospital. Doctor Osenkowski gave an affirmative reply when asked if Park's treatment of Young during this period was "sound practice" and "consistent with good medical care".

Doctor Ezra A. Sharp, who also acted as a consultant to Park, examined Young at Roger Williams Hospital in July 1965. He saw Young again in the fall of that year when he was a patient at Miriam Hospital. Young during this time was being treated for anemia. In cross-examination Dr. Sharp said that Dr. Grzebiens records presented "a clear-cut picture of polycythemia * * * andprobably vera."[1] Doctor Sharp also revealed that the ailments about which Young was complaining in the fall

of 1965 were unrelated to the treatment given by Park.

Doctor Marvin S. Kerzner, a certified internist, observed Young in Jun 1967. . At that time Young had a "sever limitation of of motion of his right hand" and a "mild weakness to the left leg." During this period was attempting to obtain workers compensation and seeking to show that his disability

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1 The term "polycythemia vera" and "polycythemia primary" are synonymous.

2 When Young was examined by Dr. Kerzner, he was attempting to collect evidence that would support his claim that his illness was work related. In a prologue to this opinion found in Young v. Park. 116 R.I. 568, 359 A.2d 697 (1967), we considered an appeal by Young from Superior Court judgment granting the motion of five named defendants to dismiss a complaint in which Young sought to include these defendants in his suit against Park. In a document entitled "Fourth Amended Complaint." Young Claimed that Park, Drs. Grzebien, Fischer, and Osenkowski, his employer, and a medical laboratory were all part of a conspiracy.

was due to conditions in the machine shop. specifically"poisonous" fums from the carbon tetrachloride used to clean the shop's mach-

inery. Doctor Kerzner made it clear that he was unable to say with any degree of certainty what was the cause of Young's complaints.

Doctor Mario G. Baldini, a professor of medical science at Brown University and chief of hematology at Pawtucket Memorial Hospital, examined Young in October 1967. In direct examination Dr. Baldini testified that he could find no evidence of polycythemia. The internist made it clear, however, this conclusion was limited to the time of the 1967 examination and based upon the information then in his possession. When in cross-examination the witness was shown the results of the laboratory tests taken in 1962 while Young was under the care of Drs. Grzebien and Fischer, he told the jury that this information certainly indicated the presence of polycythemia. Obviously, Dr. Baldini was totally unaware of this information when he examined Young.

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to misdiagnose his illness deliberately in order to protect the employer. He had alleged in the amended complaint that all the

named defendants were concealing the fact that his illness was a product of the various chemicals used at work. Young settled his compensation claim for $8,000. We affirmed the dismissal of the amended complaint as it related to Drs. Grzebien, Fischer, and Osenkowski, the employer, and the laboratory because the attempt to join this quintet came long after the atatute of limitations had expired and the record indicated that Young was well aware of the supposed conspiracy as early as January 1, 1966.

3 Young consulted Dr. Baldini in a further attempt to gain support for his carbon tetrachloride theory. When Dr. Baldini was asked who supplied him with Young's medical records he replied. "I really cannot remember after ten years who gave me those records and I have no note. You know, we practice medicine, not law in our office,"

Young, in a conversation with his employer, made it clear that he was dissatisfied with Dr. Fischer because he was "not paying any attention to me whatsoever * * *" The shop's employment manager suggested that Young seek the "new shop doctor" who was Park. apparently, Young was still convinced that he had been poisoned by carbon tetrachloride fumes.

4 Young first saw Park either in December 1964 or early January 1965. Young concedes that immediately after his first visit with Park, his blood was tested and the results for-

warded to Park.

After a physical examination, a study of Young's past history, and a consideration of the results of the laboratory test ordered after Young's initial visit, Park concluded that his patient was suffering from primary polycythemia. accordingly, the doctor prescribed a course of treatment which called for the daily consumption of a drug called Myleran. During direct examination, Park edified the jury when he pointed out that bone marrow is an essential part of the process that manufactures red blood cells and and that Myleran "suppresses the activity" of the bone marrow, thereby reducing the blood-cell production.

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4 Dr. Park, a native of South Kore, practiced medicine in that country prior to the United States in the mid-1950's. He interned in New York and in 1961 was licensed to prace in Rhode Island. Dr. Park also pursued interest in hematology through postgraduate courses taken at Tufts University School of Medicine.

In assrssing the trial justice's grant of a directed verdict, we have the same duty as the trial justice to view the evidence and

the inferences to which it is reasonably susceptible in the light most favorable to Young. We do this without weighing the evidence or assessing the credibility of witnesses. Instead, we decide whether the evidence is sufficient in law to support a verdict for the plaintiff. DiIorio v. Abington Mutual Fire Insurance Co. R.I. 402 A.2d 745, 747 (1979).

A physician is not a guarantor of either a correct diagnosis or a successful course of treatment. While there is no duty to cure, a physician is bound to exercise the same degree of diligence and skill as physicians in good standing engaged in the same type of practice in similar localities in like cases. We have repeatedly said that, as a general rule, a departure from this standard of care, whether it be at the diagnostic or treatment stage, must be established by expert testimony, except if the lack of care is so obvious as to be within the layman's common knowledge. See Schenck v. Roger Williams

Hospital, R.I. , 382 A.2d 514 (1977): Marshall v. Tomaselli & Bellavance, 118 R.I. 190, 372 A.2d 1280 (1977); Wilkinson v. Vesey, 110 R.I. 606, 295 A.2d 676 (1972).

We have no hesitation in ruling that matters concerning polycythemia and Myleran therapy are not so obvious that the need for expert testimony is obviated. Consequently, we search the record for any expert testimony that would generate a reasonable inference that Park, during the eight-month period he treated Young, departed from the acceptable community standards of care practiced by other physicians when confronted by a patient like Young. Our search and scrutiny simply reveals no such evidence and we must, therefore, affirm the grant of the directed verdict.

Before proceeding to Young's other claims of error, we would briefly address the issue of informed consent. Young was hospitalized during the summer of 1965 because he was

suffering from anemia. Park testified that he had told Young that his use of Myleran carried with it the risk of anemia. Young denied that Park had informed him of any of the risks involved in the Myleran therapy. The jury accepted Park's version of what had occurred. The trial justice, in denying the motion for new trial affirmed this finding.

In seeking a new trial, Young applies a broad brush by claiming that he was denied a "full, fair, and impartial trial." In making this claim, he first faults the trial justice for failing to require his trial attorney to hand over evidence in the case. His second contention of unfairness relates to the trial justice's refusal to admit into evidence an article by a Dr. W. F. von Oettingen. Young next complains about the trial justice's denial of his request that a manufacturer's publication about Myleran be made an exhibit. He is also critical of the trial justice's termination of his examination of Dr. Baldini and the deletion

from Dr. Coleman's medical report of two letters, one sent by Young's trial attorney to Dr. Coleman and the other a reply to the first letter. Another claim of unfairness relates to the trial justice's denial of Young's request that Dr. Sharp be recalled to the witness stand. Finally, he objects to a portion of the trial justice's charge and the denial of the motion for new trial.

In assessing these claims, we must look at what confronted the trial justice. When this case came on for trial, it had been pending in the Superior Court for ten years. On the morning of the sixth day of trial, Young discharged his trial counsel even though the trial justice advised otherwise. The discharge came at about 11 a.m., and the trial justice then recessed the trial until 1:30 p.m. because Young assured him that he would be ready to proceed at that hour. There is no indication in the record that Young ever requested his former counsel to deliver the evidence to him, nor is there any indi-

cation at this point regarding what specific evidence he had in mind.

The content of Dr. von Oetting's article remains a mystery. There was no showing that the article was either relevant or material to the issues then before the court. Furthermore, there was no compliance with the thirty-day pretrial notice required by G.L. 1956 (1969 Reenactment) 9-19-30 (1979 Supp.), a statute that in medical malpractice actions permits the introduction into evidence of relevant statements of facts or opinions contained in a published treatise, periodical, book, or pamphlet. The same thirty-day-notice requirement also applies to the manufacture's publication.

Doctor Baldini was the chief hematologist at Pawtucket Memorial Hospital when Young sought his services in October 1967. more than two years after Park had terminated his treatment of Young. As noted earlier, when Dr. Baldini examined Young, the patient was attempting to establish his claim that he

had been poisoned by the carbon tetrachloride fumes at his employer's machine shop. On the last day of trial, Wednesday, June 1, 1977 Dr. Baldini appeared voluntarily, at the request of the trial justice, to testify. The doctor had come to the courthouse on the previous Friday in response to Young's subpoena, but the trial had been recessed, and apparently nobody informed Dr. Baldini of the recess.

Young began his redirect examination by asking the witness what conclusion he reached when he was informed of the results of the laboratory tests of his blood in 1962. The internist replied: "Erythrocytosis" (Erythrocytosis is another name for polycythemia.) The interrogator then asked: "How about hemolysis?" (Hemolysis is the destruction of red blood cells.) Doctor Baldini told the trial justice and the jury that hemolysis was a completely different disease having "nothing to do with our discussion ." Young continued on the hemolysis track until the trial jus-

tice directed him to pursue another line of inquiry. Dr. Baldini was then asked to define the term "leukocytosis." "Leukocytosis," he said, is an abnormal increase "of the white cell count in the peripheral blood" When asked, "and what causes that, doctor, as a rule?" the reply was the same as it was when the question was asked in direct examination that "one hundred twenty causes are responsible." Young proceeded to ask the witness in successive order if leukocytosis was caused by "chemical poisoning," "appendicitis" or "gasoline, kerosene." When Dr. baldini gave negative responses to this line of inquiry, Young asked the witness if he "(s)tanding behind your statement that chemical poisoning doesn't cause leukocytosis".

At this point, the interrogation became a confrontation and a near argument as Young continued to refer to the chemical poisoning. Twitness began to complain about the discussion's going far afield and his inability to proper response to the questions being pro-

pounded by Young. Objections were sustained to verious questions. After Park's objection to a question asking Dr. Baldini if he knew "what poisoning would show in the blood" Young reported, "I'm confused, Your Honor" The trial justice ended the confusion by excusing the witness.

The trial justice deleted the correspondence between Young's trial counsel and Dr. Coleman on the basis that the communications were not part of the surgeon's report of Young's treatment. The attorney's letter inquired about the surgeon's willingness to testify as an expert witness in Young's behalf. The reply informed Young that the issue to be resolved at trial was not within the surgeon's expertise. Excusing Dr. Baldini as a witness and excluding the correspondence are matters within the trial justice's discretion, and we see no abuse of that discretion.

When Young complained about his inability to examine Dr. Sharp, the physician had al-

ready testified. He had been examined by Young's counsel. The issue of Dr. Sharp's return to the witness stand arose when Young presented to the trial justice "documents" that were obviously part of his former attorney's records, thatis, the attorney who first represented Young when he initiated this litigation in April 1967. The file contains notes prepared by the attorney, correspondence to and from Young and miscellaneous documents. The file was not introduced into evidence at the trial, but it was made an exhibit for the purposes of identification when the deposition of Young's first attorney was taken in July 1973. Doctor Sharps deposition was taken on August 22, 1973. The document in question is a notation that indicates Dr. Sharp's willingness to testify in Young's behalf.

Confronted with this document during the taking of his deposition, Dr. Sharp was asked if he had expressed such sentiments. He replied:

"No That is part of the patients confabulation. His method of citing talking and asking questions and assumes that he knows the answers without you giving him an answer and he'd ask all sorts of questions, and whether you say yes, no or nothing, he makes his own answers. I have nothing to do with that."

Clearly at the time Dr. Sharp testified, the opportunity was available for Young to inquire about any conversations the witness had with the attorney who first investigated Young's claim. Not one question was directed to this matter. When Young took over as trial attorney, he was not entitled to a second bite.

We find ample justification for the denial of the new-trial motion. When faced with conflicting testimony, the jury believed Park. The trial justice affirmed this belief, and there is nothing in the record which would justify disturbing the action taken by the trial justice, It is black-letter law in this jurisdiction that a charge to which no objection is lodged becomes the law of the case. Thus, Young's failure to object to the trial

justice's instructions bars any consideration of this facet of the case.

Finally, Young claims that the Superior Court erred in its denial of his pretrial motion filed under the provisions of G.L. 1956 (1969 Reenactment) 9-17-19, which authorizes the appointment of an impartial expert. This power, we have said, is purely discretionary. Raymond v. Raymond, 105 R.I. 380, 387, 252 A.2d 345, 349 (1969); DeCourcy v. American Emery Wheel Works, 89 R.I. 450, 454, 153 A.2d 130, 133 (1959). In denying the motion, the trial justice pointed out that Young had failed to make a showing that he was unable to secure expert testimony. attached to Young's motion were both the letters from his trial counsel to various physicians soliciting their assistance and their replies. One of the physicians declined to testify after reviewing the matter because of some"incredibly bizarre aspectsof your suit." There was no evidence that the other two physicians absolutely refused to testify.

We perceive no abuse of discretion in the denial of this motion.

The plaintiff's appeal is denied and dismissed, and the judgment appealed from is affirmed

Mr. Chief Justice Bevilacqua and Mrs. Justice Murray did not participate

Supreme Court

David Young :
:
v. : No. 74-237-Appeal
:
Joshua Park et al :

OPINION

DORIS, J. This is an appeal from Superior Court judgment granting the motion of five defendants, whom the plaintiff had sought to include in his action against Dr. Joshua Park, requesting a dismissal of the complaint against them for failure to state a claim upon which relief can be granted under Super. R. Civ. P. 12(b)(6). The five defendants were added by means of amendments to the plaintiffs original complaint and it was their contention that such action was barred by the statute of limitations. The Superior Court justice agreed and it is from her judgment granting the motions that the plaintiff now appeals.

David Young is a toolmaker who alleges that he was exposed to toxic chemical fumes, which he believes to have been those of carbon tetrachloride, in the course of his

employment at the C. O. Hoffacker Company (Hoffacker). He claims to have become ill as a result of this exposure and states that his illness was deliberately misdiagnosed, by the several physicians named herein as part of a conspiracy -- which also involved the legal profession -- to conceal the true nature of his illness in order to protect Hoffacker and prevent his taking action against the company.

The plaintiff became ill in 1962. He then consulted with two of the physician defendants, Drs. Fischer and Grzebien. Young was treated for some time with what he alleges was little beneficial result and was eventually placed in the care of Dr. Park, the "shop doctor," at the instigation of the Hoffacker employment manager. Young was treated by Park from January to June 1965 and in July was hospitalized for treatment of anemia and secondary bone marrow suppression, allegedly the result of drugs prescribed by Park. At this point the third

of the later-added physician defendants, Dr. Osenkowski, was called in as a consultant, and he and Park continued to treat plaintiff until September or October 1965, at which time another physician, Dr. Ezra Sharp (not a defendant) took over the case.

In January of 1966, plaintiff Young wrote a lengthy letter to The Rhode Island Medical Society outlining in great detail his charges against Hoffacker and tha four physicians named as defendants in this case. 1 That letter was sent to both the American Medical Association and The Rhode Medical Society and is included in the voluminous record of this case as plaintiff's Exhibit No. 1.

1 The plaintiff's allegations that defendant, Elmwood Medical Laboratory, Inc. had forged certain test results were originally made to Dr. Sharp in November 1966 according to plaintiff's deposition.

Subsequent to these medical developments, in April of 1967 plaintiff filed suit against Dr. Park for malpractice and shortly thereafter filed a petition against Hoffacker in the Workmens Compensation Commission. Two

more petitions were eventually filed and, and, according to plaintiff's brief, the claim in the third and last petition was settled by the insurance companies representing Hoffacker before it was heard by the full commission. The plaintiff was assisted by a series of lawyers in these matters, most of whom, he now alleges, were involved in the medical conspiracy to protect Hoffacker. although none are named here as defendants

The merits of plaintiff's case are not before the court at this time. It is his attempt to join Drs. Grzebien, Fischer and Osenkowski, and Hoffacker and Elmwood Medical Laboratory, Inc., to his suit against Dr. Park that concerns us here. For the reasons we now state, we find that the complaint against the later-added defendants was properly dismissed as barred by the statute of limitations under Super. R. Civ. P. 12(b)(6)[2]

2 The plaintiff did not raise the issue of Super. R. Civ. P. 15(c) which permits the relating back of an amendment changing or adding a party to the original action under certain circumstances but he could, in any

case, have taken no comfort therein since there is no evidence in the record that his later-added defendants had notice of the original suit against Dr. Park nor that his failure to bring timely action against them was the result of "mistake" on his part that he knew or should have known about -- two conditions precedent to invocation of Rule 15(c). Dalessio v. B. T. Equipment Co., 114 R. I. 524, 336 A.2d 563 (1975), Strasmich v. Cucuio, 110 R. I. 460, 293 A.2d 509 (1972)

At the time plaintiff initiated his suit against Dr. Park, the applicable statute of limitations in personal injury cases permitted actions to be brought "within two (2) years next after the cause of action shall accrue * * *." General Laws (1969 Reenactment) 9-1-14 (subsequently amended to three years, P. L. 1971, ch. 200, 1). The running of this statute, and other statutory limitations, may be tolled while a person is under the legal disability caused by unsound mind, imprisonment, absence from the country, or being under the age of majority (section 9-1-19), or while a party neither knew nor should have known that he has a cause of action either because the injury has not manifested itself in a medical malpractice

situation, Wilkinson v. Harrington, 104 R. I. 224, 243 A.2d 745 (1968), or because the cause of action has been fraudulently concealed by the person liable on the action. Section 9-1-20.

It is clear from the face of the fourth amended complaint that none of the alleged acts or omissions of the later-added defendants took place within any of the statutory limitations. The events complained of took place between September 1962, when plaintiff first fell ill, and September 1965 when he was discharged from the hospital as Dr. Osenkowski's patient and his case was taken over by another physician. The suit against Dr. Park was brought in April of 1967, within the statutory time limit in personal injury cases, but it was not until February 16, 1973, that the first of the amended complaints against the other defendants was filed -- more than seven years after the latest date on which it could possibly be said that the cause of action accrued and well beyond

even the general six-year statute of limitations set forth in 9-1-13

It is equally clear that as of January 1, 1966, plaintiff was fully aware of his alleged injuries and the alleged efforts of defendants to conceal tha fact that the injuries were the product of "toxic poisoning" by chemicals at the Hoffacker plant. The plaintiff's letter to The Rhode Island Medical Society substantiates this knowledge and, together with the fact that he was not suffering from any of the statutory disabilities, precludes his reliance on either 9-1-19 or 9-1-20 to toll the running of the statute.

The plaintiff argues, however, that this court should create a new exception to toll the running of the statute based on his "de facto" disability to bring suit because of the alleged medico-legal conspiracy to protect Hoffacker. He further argues that to apply the statute of limitations in the present circumstances would deny him the right to trial by jury guaranteed by the

fourteenth amendment to the United States Constitution. and article I, 5 and 15 of the Rhode Island Constitution.

The plaintiff's argument that we should now add a new disability, based on a theory of conspiracy to thwart litigation, to the historic catagories of insanity, imprisonment, minority or absence from the country,[3] is not persuasive and could not, in any event, avail him of the relief he seeks. The record indicates that far from being thwarted, he was able successfully to prosecute a Workmen's Compensation claim against Hoffacker to the point of settlement, to bring a malpractice suit against the Hoffacker shop doctor, and to prosecute the present appeal with regard to defendants he now seeks to add to the original malpractice action.

It is undeniable that application of the statute of limitations in the present circumstances will deprive plaintiff of a trial by jury against the later-added

defendants.

> "Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by stale ones." Johnson v. Railway Express Agency 421 U.S. 454, 463-64, 95 S.Ct. 1716, 1722, 44 L.Ed.2d 295, 303 (1975).

But as the United States Supreme Court said many years ago "Statutes of limitation are vital to the welfare of society and are favored in

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3 "The term "legal disability" has had a fixed and well-defined meaning since provision for relief therefrom was first made in 1623 in the Statute of 21 Jac.I, c. 16." Marcos v. United States, 106 F.Supp.172, 175 (U.S.Court of Claims, 1952), overruled on other grounds, 145 F.Supp. 935 (U.S. Court of Claims, 1956). In this context it refers specifically to these four categories, now codified in G. L. 1956 (1969 Reenactment) 9-1-19

the law." Wood v. Carpenter, 101 U.S. 135, 139 (1879). We therefore, cannot agree with plaintiff's contention that the statutory prohibition of his ability to maintain this action would result in an unconstitutional deprivation of his rights.

It should be noted that although the statute of limitations is designated as an affirmative defense in Super. R. Civ. P. 8(c) as it is under the federal rules, modern practice permits it to be raised by motion to dismiss under Super. R. Civ. P. 12(b)(6) where, as here, the defect appears on the face of the complaint. Tasby v. Peek, 396 F.Supp. 952 (W.D. Ark. 1975). See also I Kent R. I. Civ. Prac. 12.10 at 116 (1969).

In another case decided under the federal rules the court stated:

> "*** the inclusion of dates in the complaint showing the action to be untimely renders the complaint subject to dismissal upon motion, See Kincheloe v. Farmer, 214 F. 2d 604 (7th Cir. 1954) cert. denied 348 U.S. 920, 75 S.Ct. 306, 99 L.Ed. 721 (1955): see generally 5 Wright and Miller, Federal Practice and Procedure 1226, 1357 (1969) ***" Wilburn v. Pepsi-Cola Bottling Co.,492

As can be seen from the face of the fourth amended complaint.

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4 As we stated after the new rules of civil procedure were adopted in this state: "* * * we apply the guides established in the federal courts for the construction of their rules upon which ours have been modeled." Bragg v. Warwick Shoppers World, Inc. 102 R.

I. 8, 11, 227 A.2d 582, 584 (1967): see also Nocera v. Lembo, 111 R. I. 17, 298 A.2d 800 (1973)

and the dates included therein, the statute of limitations is a bar to any proceedings by the plaintiff against the five later-added defendants, the running of the statute not being tolled by any recognized exception or disability. The defense was properly raised by a motion to dismiss for failure to state a claim upon which relief can be granted under Super. R. Civ. P. 12(b)(6) and the judgment appealed from is hereby affirmed.

The plaintiff's appeal is denied and dismissed, the the judgment appealed from is affirmed, and the case is remanded to Superior Court.

STATE OF RHODE ISLAND; PROVID ENCE. SC.
WORKMEN'S COMPEMSATION COMMISSION

DAVID A. YOUNG	)	
	)	
VS.	)	W.C.C. No. 70-0416
	)	
C. O. HOFFACKER CO.	)	

D E C R E E

The above matter came on to be heard upon the employee's original petition and after evidence was heard the following findings of fact were made;

1. That the petitioner, while in the employ of the respondent, did not come in contact nor was he subject to the fums or effects of a chemical known as carbon tetrachloride.

2. That even if the petitioner had in any way been exposed to carbon tetrachloride while in the employ of the respondent, he has failed to prove that there was any causal connection between any incapacity and loss of use of the right upper extremity and the exposure to carbon tetrachloride.

And after said findings, it is hereby

ORDERED, ADJUDGED and DECREED

That the petition be and hereby is denied and dismissed.

ENTERED as a Decree of this Commission this 3rd day of September, 1971.

Per Order

John Filipponi
Clerk

Enter

Kingsley
Sept. 3, 1971

To; Thomas C. Angelone, Esq.
808 Union Trust Building
Providence, Rhode Island

The above decree will be presented at the Workmen's Compensation Commission for entry on September 3, 1971.

Charles H. Anderson
Attorney for the Respondent

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

PROVIDENCE, SC. SUPREME COURT

IN THE SUPREME COURT OF
THE STATE OF RHODE ISLAND

DAVID A. YOUNG, SR. APPELLANT

VS. C.A. 77-363-A

JOSHUA PARK, et al. Appellee

NOTICE OF APPEAL TO THE SUPREME
COURT OF THE UNITED STATES

Notice is hereby given that David A. Young, Sr., the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Rhode Island affirming the dismissal of the complaint entered in this action on July 21, 1980.

This appeal is taken pursuant to Title 28 U.S.C. 1257(2).

David A. Young Sr. PRO-SE

Dated; August 15, 1980

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

PROVIDENCE, SC. SUPREME COURT

IN THE SUPREME COURT OF
THE STATE OF RHODE ISLAND

DAVID A. YOUNG, SR., APPELLANT

VS. C.A. 77-363-A

JOSHUA PARK, et al, APPELLEE

AMENDED
NOTICE OF APPEAL TO THE SUPREME
COURT OF THE UNITED STATES

Notice is hereby given that David A. Young Sr. the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Rhode Island affirming the dismissal of the complaint entered in this action on July 21, 1980.

This appeal is taken pursuant to Title 28 u.s.c. 1257(1).

David A. Young Sr., PRO-SE

Dated; August 29, 1980

Edward A. Ricci, M. D.
15 Thomas Street
North Providence R.I. 02911

David Young
22 Berwick Ave.
North Providence, R.I.

Re; David Young. 58

To Whom it may. Concern

Above under my care and seen between intervals of 1 to 3 months since 1969.

History; Leaving his work in October, 1962 because of toxic fumes of carbon tetrachloride from spraying and degreasing.

Returned to work in 1963 and again quit sick again from the same type of fumes he has not worked since. He has gradually produced an atrophy of his right hand and some of the left leg with generalized weakness over entire body. There could be some connection of the cause being due to carbon tetra chloride toxicity. Presently exam shows male, age 58, apprehensive, gait Slow and also displaying as stated atrophy of the muscles of his right hand and some of the left leg. B/P 180/108 originally in 1969

152/94. A complete blood count of January 23, 1975 at medical lab. was Hb. 17.8, erythrocyts 6 million, Hematocrit 54 VPC, Leukocyts 12,400 Neutrophils 79%. Lymphocytes 17% Diagnosis and comment;

Mr. Young is totally incapacitated for work because of weakness due to generalized peripheral neuropathy moreso of the right hand and left leg. This also resulted in a sever anxiety state, and as stated there could be some connection to the original carbon tetra chloride poisoning at work.

Sincerely Edward A. Ricci M. D.

Blood remaking glands

DEC 31 1980

No. 80-897.

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

DAVID A. YOUNG, SR.,
APPELLANT,

v.

JOSHUA PARK,
APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF RHODE ISLAND.

Motion to Dismiss.

ROBERT D. PARRILLO,
HANSON, CURRAN & PARKS,
1210 Turks Head Building,
Providence, Rhode Island 02903.
(401) 421-2154

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

No. 80-897.

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

DAVID A. YOUNG, SR.,
APPELLANT,

v.

JOSHUA PARK,
APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF RHODE ISLAND.

Motion to Dismiss.

Appellee, pursuant to Rule 16.1 of the Rules of the Supreme Court of the United States, moves to dismiss the appeal on the ground that there is no issue of federal law drawn in question. In the alternative, if the Court considers the appeal to involve questions of federal law, appellee moves to dismiss the appeal on the ground that the questions presented are so insubstantial as to require no further argument.

This is a direct appeal from the final judgment and decision of the Rhode Island Supreme Court of July 21, 1980 denying and dismissing appellant's appeal to that court.

Appellant's action is for malpractice and alleges negligent diagnosis and treatment by appellee as well as failure by appellee to obtain appellant's informed consent to treatment.

During the conduct of the trial appellant dismissed his attorney. At the conclusion of the jury trial the trial justice directed a verdict for appellee on the negligence count and the jury returned a verdict for appellee on the informed consent count.

Appellant prosecuted an appeal to the Rhode Island Supreme Court, where appellant challenged the trial court's failure to appoint an expert witness to testify in appellant's behalf and the granting of a directed verdict for appellee. Appellant no longer pursues those issues in this Court and, had he done so, these are obviously non-federal grounds to which no appeal lies in this Court.

Appellant also challenged a variety of rulings made during the trial subsequent to the time he discharged his attorney. The challenged rulings were discretionary decisions concerning admissibility of evidence and the conduct of trial testimony. *Young* v. *Park*, R.I. , , 417 A.2d 889, 893-95 (1980). These rulings were said by appellant to have deprived him of a "full, fair, and impartial trial" which he claimed is conferred by R.I. Const., art. 1, § 5, entitled Remedies for wrongs — Right to justice. Contrary to appellant's assertion in his Jurisdictional Statement at 19, no mention of any federal right was made before the Rhode Island Supreme Court.

Appellant now contends that his Fourteenth Amendment due process rights were denied by these evidentiary rulings. Inasmuch as the purported federal issues now being raised were not brought before the state court, this appeal is not properly before this Court. *Cardinale* v. *Louisiana*, 394 U.S. 437, 438, 439 (1969).

It is questionable that evidentiary rulings made by the trial justice rise to the level of being considered federal due process issues. The state court judgment rests on adequate and independent state grounds where the state appellate court's review is of discretionary evidentiary rulings made by a trial

justice under state law. This Court should, therefore, refuse jurisdiction. *Herb* v. *Pitcairn*, 324 U.S. 117, 125 (1945). Assuming that such evidentiary rulings are of Fourteenth Amendment magnitude, they are so frivolous and insubstantial as not to merit consideration by this Court.

Wherefore, appellee submits that no federal issue is drawn in question and should the issues presented be considered to be federal issues, they are so insubstantial as to require no further argument and appellee respectfully moves to dismiss this appeal.

Respectfully submitted,

ROBERT D. PARRILLO,
HANSON, CURRAN & PARKS,
1210 Turks Head Building,
Providence, Rhode Island 02903.
(401) 421-2154
Counsel for Appellee,
Joshua Park.